DAVID WILKINSON, PLAINTIFF IN ERROR *vs.* THOMAS LELAND AND OTHERS, DEFENDANTS IN ERROR.

J. J. died in New Hampshire, seised of real estate in Rhode Island, having devised the same to his daughter, an infant. His executrix proved the will in New Hampshire, and obtained a license from a probate court, in that state, to sell the real estate of the testator for the payment of debts. She sold the real estate in Rhode Island for that purpose, and conveyed the same by deed; giving a bond to procure a confirmation of the conveyance by the legislature of Rhode Island. The proceeds of the sale were appropriated to pay the debts of the intestate. Held, that the act of the legislature of Rhode Island, which confirmed the title of the purchasers, was valid.

The legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state. The sale of real estate in Rhode Island, by an executrix, under a license granted by a court of probate of New Hampshire, was void; and a deed executed by her of the estate was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. [655]

By the laws of Rhode Island, the probate of a will, in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. [655]

That government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property, should be held sacred. At least, no court of justice in this country would be justified in assuming, that the power to violate or disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention. [657]

It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee of an estate unconditionally devised to him, is upon the death of the party under whom he claims immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens, which have been created by the party in his life time, or by law at his decease. It is not an unqualified, though it may be a vested interest, and it confers no title, except to what remains after every such lien is discharged. [658]

By the laws of Rhode Island, as well as of all the New England states, the real estate of intestates stands chargeable with the payment of their debts upon a deficiency of assets. [658]

A legislative act is to be interpreted according to the intention of the legislature apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. [662].

[Wilkinson *vs.* Leland and others.]

ERROR to the circuit court of Rhode Island.

This case came before the Court upon a bill of exceptions tendered by the plaintiff in error, they having been defendants below, on the trial of the cause in the circuit court. In that court the defendants in error instituted an ejectment for the recovery of a lot of ground called "The Swamp Lot," lying in North Providence in the state of Rhode Island; which lot of ground was, with other lands, devised by Jonathan Jenckes of Winchester in the state of New Hampshire, by his last will and testament, dated the 17th of January 1787, to his daughter Cynthia Jenckes; subject to a life estate therein of his sister Lydia Pitcher, who was then in possession of the same, and so continued until her death on the 10th of August 1794.

Jonathan Jenckes was also seised of other lands in north Providence and in Smithfield, Rhode Island; and also of real estate in New Hampshire and in Vermont, most of which were devised to his daughter Cynthia. A small part of his New Hampshire lands was devised for the payment of his debts. Cynthia Jenckes his wife, and Arthur Fenner of Providence, Rhode Island, were appointed the executors of his will. Cynthia Jenckes, alone, qualified as executrix. The testator died at Winchester in New Hampshire, on the 31st of January 1787, a few days after making his will.

No probate of the will of Jonathan Jenckes was made in the state of Rhode Island.

The plaintiffs in the ejectment are the heirs of Cynthia Jenckes, and claim the premises under the devise to her, she having afterwards intermarried with Joel Hastings.

The title of the plaintiff in error was as follows:

Cynthia Jenckes the widow and executrix of Jonathan Jenckes, having been qualified in New Hampshire to act as executrix, on the 18th of August 1790, returned to the probate court of the county of Cheshire, an inventory of the real and personal estate in New Hampshire and Vermont, amounting to £1792 12*s.* 9*d.* A commission of insolvency was afterwards granted by the probate court, and on the 3d of January 1792, the commissioners reported the whole amount of debts due by the estate; of which 6920 19*s.* were due to citizens of Rhode Island. In February 1792, the executrix

settled her account in the probate court, and a balance of £15 7*s.* 7*d.* remained in her hands, "the guardian of the *heirs* appearing and consenting" to the settlement.

On the 22d of July, 1790, a license to sell the real estate of Jonathan Jenckes, to pay and discharge the debts of the estate, was granted by the probate court of Cheshire county; and on the 12th day of November 1791, Cynthia Jenckes, as executrix of Jonathan Jenckes, sold and conveyed by deed to Moses Brown and Oziel Wilkinson, the reversion of the three acre Swamp lot, the premises in dispute. The other real estate in Rhode Island was also sold and conveyed by her at the same time.

On the day the sale was made, Cynthia Jenckes executed a bond to the purchasers, reciting that by virtue of the license, and in pursuance of its directions, a sale had been made of all the estate which belonged to the testator in the towns of Providence, Smithfield, and North Providence, in the county of Providence, and state of Rhode Island, and that she had received pay for the same; "and whereas some doubts may arise whether a sale and conveyance so made, by virtue of the license of the judge of probate, in the state of New Hampshire, will give a good and sufficient title to lands and tenements lying in the state of Rhode Island, and Providence plantations; now, for the clearing of all doubts respecting the premises, I, the said Cynthia Jenckes, in my said capacity, do covenant, and engage for myself, my heirs, executors and administrators, to and with the said Moses Brown, Oziel Wilkinson and Thomas Arnold, their heirs, executors and administrators, that I will procure an act to be passed by the legislature of the state of Rhode Island, ratifying and confirming the title by me granted and conveyed as aforesaid, to them and their heirs and assigns forever; or in failure thereof, that I will repay the purchase money which I have received for the same, with lawful interest, and such reasonable costs and damages which they may or shall thereby sustain, as shall sufficiently indemnify, and save them free from loss in the premises, to all intents and purposes."

At the June sessions of the legislature, Cynthia Jenckes,

by her attorney regularly constituted, petitioned the legislature of the state of Rhode Island, representing, "that the personal estate of the said Jonathan Jenckes, being insufficient to pay his debts, your petitioner obtained authority from the honourable John Hubbard, judge of probate for the county of Cheshire, in said state of New Hampshire, where the said Jonathan last lived, to make sale of so much of the real estate of the said Jonathan Jenckes, as should be sufficient for the purpose of paying his debts; that your petitioner, in pursuance of said authority, sold and conveyed a part of said deceased's estate, situate in this state; that for the said estate our petitioner received a part of the consideration money, and the residue thereof is to be paid when the deed executed by your petitioner shall be ratified by this assembly; your petitioner would further show, that the residue of the said purchase money is absolutely necessary to pay the debts due from said estate, and which are now running in interest. She therefore humbly prays, your honours will be pleased to ratify and confirm the sale aforesaid, being by a deed made by your petitioner unto Moses Brown and others, on the 12th day of November, A. D. 1791, for the consideration of five hundred and fifty dollars; whereby your petitioner conveyed the right of redemption to a certain mortgaged estate, and also other lands in said deed mentioned, situate in Smithfield and North Providence."

Whereupon the legislature passed the following act:

State of Rhode Island, &c.

At June session of the General Assembly, A. D. 1792.

Whereas, Cynthia Jenckes, late of Winchester, in the state of New Hampshire, now of the state of Vermont, executrix of the last will and testament of Jonathan Jenckes, late of Winchester aforesaid, deceased, preferred a petition and represented unto this assembly, that his personal estate being insufficient for the payment of his debts, she obtained authority from the honourable John Hubbard, esq., the judge of probate for the county of Cheshire, in the state of New Hampshire aforesaid, where the said Jonathan last lived, to make sale of so much of the real estate of the said Jonathan Jenckes, as should be sufficient to pay his debts; that

by virtue of said authority she made sale to Moses Brown and others, of part of the said real estate, situate within this state; that she hath received part of the consideration money, and the remainder is to be paid when the sale aforesaid shall be ratified by this assembly; and that the residue of said purchase money is necessary for the payment of said debts; and thereupon, the said Cynthia prayed this assembly to ratify and confirm the sale aforesaid, which was made by a deed executed by her on the 12th day of November last past, for the consideration of five hundred and fifty dollars, whereby she conveyed the right of redemption to a certain mortgaged estate, and also other lands in the said deed mentioned, situate in Smithfield and North Providence.

On due consideration whereof, it is enacted by this general assembly, and by the authority thereof, that the prayer of the said petitioner be granted, and that the said deed be, and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in the estate mentioned in said deed, which belonged to the said Jonathan Jenckes at the time of his decease.

A judgment pro forma, for the plaintiffs, was entered in the circuit court, and this writ of error was sued out.

The case was argued by Mr Whipple, and Mr Wirt, for the plaintiff in error; and by Mr Webster, with whom was Mr Hubbard, for the defendants.

Mr Whipple, for the plaintiffs in error, after stating the facts of the case, proceeded to say, that the whole case before the Court, turns upon the constitutional validity of the act of the legislature of Rhode Island.

All the lands of Jonathan Jenckes, in the state of New Hampshire, were sold for the payment of debts. A large amount of debt was due in Rhode Island; and it is admitted that the proceeds of the sale of the swamp lot were applied to the payment of the debts of the testator. It is also admitted that all the personal estate had been absorbed by the payment of debts in New Hampshire. The question arising from these facts of the case is, whether a deed of land in Rhode Island, made by a New Hampshire executor, qualified

in New Hampshire, and not in Rhode Island, the sale being fairly made for the payment of debts, and the deed being subsequently ratified and confirmed by the legislature of Rhode Island, constitutes a valid conveyance. It is contended that it does: and it is at the same time conceded, that such a deed without such confirmation is absolutely void. This view of the case presents necessarily the question of the power of the legislature to pass the law.

No other limit to the power of the legislature of Rhode Island is known, than that which is marked out by the constitution of the United States. If any clause in that instrument is expressly or virtually infringed by the confirmatory act of 1792, such a violation would render the act a nullity. The national constitution being the only limitation, the Court has no right to pronounce a law of Rhode Island void, upon any other ground. It has been said in England, that an act of parliament, contrary to the principles of natural justice, would be void. Such an opinion, in reference to a law of a state, has never been intimated in this Court.

But, suppose the *people* to make an express grant, authorising the legislature to appoint a man a judge in his own case; or to pass any law contrary to natural justice: so long as none of the prohibitions of the constitution are violated, what right has this Court to interfere?

What was done in the case before the Court, was with the full knowledge, concurrence, and assent of the *people* of Rhode Island. Acts authorising foreign executors to sell real estate, and acts confirming void deeds, have been passed ever since the settlement of the state. Having no written constitution, *usage* is the law of Rhode Island. The papers in the case clearly show that the legislature of that state always has exercised *supreme legislative, executive,* and *judicial power*(a). There is an executive magistrate, but he is

(a) In the course of the argument of the case, the counsel of the plaintiff in error cited from the statutes of the state of Rhode Island, a number of laws passed by the legislature of the state in which the powers asserted to be vested in that body were exercised.

August 1773. Randall *vs.* Robinson. A petition for a new trial, after a new trial had been given by the court. Granted.

totally destitute of executive power. He cannot pardon the slightest offence; he has no *veto* on legislation; and he can-

Ross *vs.* Stow. Petition for a new trial after two verdicts had passed against the petitioner, and to remove the cause into another county. Granted.

August 1774. Petition of Augustus Mumford for leave to amend a judgment he recovered against Simon Hazard, from twenty-four to seventy-four dollars. Granted.

Petition from John Randall, stating that he had again obtained a verdict against Matthew Robinson for thirty-five pounds, which the supreme court, on motion of Robinson, had set aside, and praying that the judgment be set aside, and "the verdict remain fair as at first received, and that the next superior court may be empowered to enter up judgment thereon in his favour, for his damages and costs by the said last jury found." Granted.

Petition of George Elam, stating that a final decree of the king in council had been obtained by him against John Dorkray, and praying that the supreme court be *ordered* to carry the same into effect. Granted.

March 1776. Petition of Benoni Pearce, administrator, to sell real estate to pay debts. Granted.

June 1776. Petition of Mary Mason to appoint some person to sell the estate of orphans, one of them having gone to sea two years ago, and not since heard of. Granted.

December 1776. Petition stating that judgment had been obtained against the petitioner for more than the debt due. Granted, and the judgment declared null and void, and the Court directed to *chancerize* the bond.

March 1777. Petition of Caleb Fuller, stating that he and Shore Fuller of Rehoboth, Massachusetts, are joint owners of a ferry, and that Fuller refuses to use it by turns, the one during one week, and the other the next; and praying "the assembly to grant that he shall improve said ferry with said Fuller in turns, exchanging every other week, and that his turn may begin the first day of next week, as has been customary for a number of years heretofore, &c. Granted.

Petition of Samuel Brown, administrator, stating that the intestate covenanted to give a deed to Nathan Crary of the state of Connecticut, of a house and lot, but died before executing it; that the estate of the intestate is insolvent, and prays to be authorized to give the deed to Crary, in pursuance of said covenant. Granted.

February 1778. Petition of Benoni Pearce praying to be released from his executorship, on paying the balance in his hands to the town council of Providence. Granted.

August 1779. Petition of Othniel Goston, stating that administration had been granted upon his daughter's estate, and that the administrators had brought actions against him; and praying that the administration might be set aside. Granted, and that the town council be directed to revoke the same, and to grant administration to the petitioner.

1781. Petition of Sylvester Gardner, deputy quartermaster, stating that he, by order of his superior officer, seized a quantity of stock and sold it for the benefit of the United States; that he is sued for taking said stock, *and prays that the action may be stopped.* Granted.

Petition of Martha Hartshorne, stating that her husband devised certain real

not appoint a single officer in the state; all the executive powers are exercised by the legislature.

So of its *judicial* powers. We have courts acting under standing laws; but one of those standing laws authorizes the legislature upon a petition for a new trial to set aside judgments at its pleasure. Originally the legislature was the only court in the state. It exercised common law, chancery, probate, and admiralty jurisdiction. Its chancery jurisdiction it has never parted with. It is the best court of chancery in the world. Its probate power, though conferred upon inferior courts, has always been exercised concurrently with them. Accordingly, we find frequent instances of wills proved, and administration granted, by the legislature.

The power of granting license to sell real estate, of proving wills and of confirming void deeds, has been so long and so frequently exercised, that it has been known by almost every man in the state. The *people*, knowing this usage, have *acted* under it, and there is hardly an acre of land in Rhode Island which, in some period or other, has not been sold by executors, administrators or guardians licensed by the general assembly; or conveyed by void deeds, confirmed by that body. To draw into question the validity of such conveyances, would shake almost every title in the state.

estate to her for life, remainder to his son in fee, praying that she may sell part of the estate for her support. Granted.

1782. Petition of Archibald Young and others, praying that part of the real estate of a *non compos*, may be given in fee to such person as will give bond to support her; remainder to be divided among the heirs in fee, provided they give bond to restore it in case she is restored to her mind. Granted; and the superior court ordered to carry the prayer of the petition into equitable execution.

1783. Petition of Z. Hopkins, stating that he was treasurer of Gloucester, was sued upon notes given by him officially, and judgment has been recovered against him, and praying that execution may be issued against the present treasurer. Granted.

1783. Petition of William Haven, praying that a decree of the admiralty court may be set aside and a trial allowed. Granted.

1784. On petition, a deed of gift from Gideon Sissor to his infant children was declared void and fraudulent, and the estate was restored to him.

1786. Stephen and Daniel Stanton were appointed guardians of their father, and allowed to sell his real estate to pay debts, &c.

1791. Petition of Mary Dennison of Stonington, Connecticut, executrix, for the sale of real estate in South Kingston to pay debts, and to account with the Judge of probate in Connecticut. Granted.

Resort however to the extraordinary powers of the Rhode Island legislature to protect the present conveyance, is unnecessary. Every legislature in the union possesses similar authority, unless expressly restrained by its local constitution. The *subject matter* of the conveyance was land lying within the state; and, consequently, exclusively within the jurisdiction of the state. How the land shall pass from one man to another, whether by deed under seal, or by mere delivery; how it shall be appropriated to the payment of debts whether by attachment and sale, or by mesne or final process; or whether it shall be totally exempted from attachment; what form shall be observed by executors and administrators, selling for the payment of debts; how they shall be qualified, and from whom they shall obtain a license; whether the deed shall precede the license, or the license precede the deed; are all questions to be decided by the legislature: and their decision is conclusive upon all mankind. Whether they decide by a general law or a special act. is matter exclusively of legislative discretion.

It is however considered unnecessary to attempt to ascertain the extreme limits of state power in regard to its domain. *All* the power over that subject, whatever may be its measure, is in the states. A very small portion of it was exercised in the present case. The principles of natural justice were not violated, unless it is unjust to appropriate the property of a debtor to the payment of his debts. No vested rights were disturbed, because Cynthia Jenckes, the devisee, took the estate subject to the debts of the testator. The general law of Rhode Island furnished the creditors with various direct remedies against the estate itself. It was liable in an action against the devise to have been attached on an original writ and sold upon execution. A creditor might have taken administration, and petitioned the supreme court for a license to sell. The right of the devisee, therefore, was subject to such remedies as had been previously provided by the general law, and also to such remedies as the legislature chose subsequently to provide. The application of the general or the special remedy, would *alter* but not *impair* the rights of the parties. Previous to the sale, the

right of the creditor was to obtain payment either from the devisee or the estate. The right of the devisee was to hold the estate subject to this elder right of the creditor. It was at her election to discharge the debts voluntarily, and remove the incumbrance from the estate; or to allow the creditor to proceed under the best remedy he could obtain. The deed of the executrix and the act of the legislature, constituted a cheap and summary remedy for the enforcement of the rights of the creditor. If the estate had not come to the hands of the devisee loaded with the lien of the creditors, it might have been difficult to have considered the act as merely remedial; for it would have bestowed new rights upon the creditor and heaped new obligations upon the devisee.

Three propositions then may safely be advanced in relation to this act. 1. That no injustice was done. 2. That vested rights were not disturbed. And 3. That the obligation of contracts was not impaired.

The power of the legislature to furnish remedies in favour of existing rights, was exercised to a much greater extent in the cases of Calder *vs.* Bull, 3 *Dall.* 386; Underwood *vs.* Lilly, 10 *Serg. & Rawle*, 97; and Foster *vs.* The Essex Bank, 16 *Mass. Rep.* 245, than in the case before the Court.

It may be urged, that no *notice* was given to the devisee; that her title was divested by the void deed of an unauthorized executrix, confirmed by an act to which she was not a party, and the existence of which she was ignorant of until her estate was taken from her.

If notice was necessary, it may safely be presumed, at the end of thirty six years. 15 *Mass. Rep.* 26. But notice was not necessary. It was not an *adversary* proceeding. If the *creditors* had petitioned for a remedy against the estate, common justice would have required notice to the devisee. But the petition was by the *legal representative* of the estate; the legal representative, in Rhode Island as well as in New Hampshire. The power of an administrator is confined to the state for which he is appointed. He is not the representative of the intestate in any other state. But the power of an executor is coextensive with the estate of the testator. He derives his power from the *will*, and he has

an exclusive right to administer wherever any estate may be found. The moment the testator died, the power of his executrix over his estate in Rhode Island was precisely the same as over his estate in New Hampshire. It was complete in both states, except as to the bringing actions and the sale of real estate. She could bring no action in *either*, until she qualified by giving bond. She could not sell real estate in *either*, until she had obtained a license. In all other respects her power was the same in both states. The will gave her the *exclusive right* to administer in both states. She had a *right* to apply for a probate of the will, and for license to sell in both states. The will was the power. The executrix was the attorney; and every act which the power authorized her to do, she could rightfully perform without notice. There is no difference, in this respect, between a will and any other power. The executrix in petitioning the legislature of Rhode Island for power to sell, was acting as the representative of Jonathan Jenckes, was taking a step she had a right to take without consulting heirs or devisees, and without giving them notice. The general law of Rhode Island authorized an executor to petition the supreme court for a license, without giving notice. Why should she give notice when she petitioned the legislature?

There is a wide difference between the right to *sell*, and the right to *apply for a license to sell*. The former is derived from the decree of a court or legislative act. The latter is from the *will itself*. These positions are fully sustained in *Toller on Wills*, 41. 65, 66. 70; *Lord Raym.* 361; *Strange's Rep.* 672; 1 *Dane's Abridg.* 558; Burnley *vs.* Duke, 1 *Rand.* 108; Jackson *vs.* Jeffries, 1 *Marshall*, 88; and Rulluff's case, 1 *Mass.* 240; Rice *vs.* Parkman, 16 *Mass.* 326.

It must be admitted then, that as this act of the legislature impaired no contracts, and interfered with no vested rights, that they had the constitutional power to pass it. It must also be admitted that the executrix had a right to apply for a license to sell, wherever real estate could be found, until the debts were paid; and that there was no more necessity

of giving the heirs notice of such an application in Rhode Island, than there would have been upon a similar application in New Hampshire.

The cases in 3 *Dallas*, 386, 12 *Wheaton's Rep.* 378, 9 *Mass. Rep.* 151. 360, 4 *Conn. Rep.* 209, and 16 *Mass. Rep.* 260, also show, that it is no objection to the act that it is *retrospective* and *private*.

These constitute all the objections that are anticipated against the *legal validity* of the act. The principal if not the only objection that will be much relied upon, relates to its *legal effect* rather than to the power of the legislature to pass it.

The grounds that will be mainly contended for, it is supposed, will be these; that admitting that the legislature had sufficient power to have authorized the executrix to make a future sale, yet instead of this, they undertook to confirm a previous sale; that they passed an act in June 1792 confirming a *void* deed made in November 1791. As the executrix in November 1791 acted under the license of the court of probate in New Hampshire, and had obtained no authority to sell from any court in Rhode Island, it is very clear that the deed, without such authority, was a mere nullity. The bond entered into by the parties, providing that unless the executrix obtained a ratification of the sale by the legislature, is satisfactory evidence that the parties considered the deed of no validity.

The act of the legislature then *confirms* a *void* deed, and the old principle of the common law, that a deed of confirmation will not validate a previous void deed, will be relied upon. In. *Co. Litt.* 295, *b.* it is said "a confirmation doth not strengthen a void estate, for a confirmation may make a *voidable* or defeasible estate good, but it cannot work upon an estate that is void in law." This is the uniform language of the ancient books, and the reason of the principle is found in *Gilbert's Tenures*, 75. 78. "A confirmation passes *no new* estate to the grantee: it is the assent of the confirmer, that the grantee may hold *the* estate previously granted."

This being the rule between parties to conveyances, it is

supposed that a confirmation by the legislature, is to be construed by the same rule. Cynthia Jenckes, the executrix, in November 1791, made a deed of all the right, title and interest of Jonathan Jenckes the testator in the demanded premises. Having obtained no previous license, the deed was void. The argument is that a deed of confirmation by Cynthia Jenckes the devisee, would have been of no force, and that therefore a confirmation by the legislature was equally void.

Two answers may be given to this very plausible reasoning. 1. We deny that a confirmation by the devisee of the void deed of the executrix would have been invalid; and if it would, we deny, 2. That it necessarily follows that a confirmation by the legislature, is of the same character.

Would a confirmation by the devisee have been binding? It is admitted that in general a confirmation of a void deed is inoperative. An examination of the reason of the rule, however, will show its inapplicability to this case. It applies to a deed void for want of *estate* in the first grantor. As for instance, A. is the owner in fee of a lot of land. B. having no title, makes a deed to C. which is a mere nullity. Afterwards A. confirms to C. the deed of B. What does this amount to? Why, in the language of the books, "to the assent of the confirmer, that C. may hold *the* estate conveyed by B." What was that estate? The title of B. If Cynthia, the mother, had conveyed to Brown and Wilkinson *her* title to the land of Jonathan Jenckes, a confirmation of *such* a deed, upon strict principles, would have been inoperative. But she acted as *executrix;* she conveyed not her *own*, but the title of *Jonathan Jenckes.* A confirmation by the devisee, would have been an assent that the grantee should hold "the estate" conveyed by the deed. Whose estate? Why the estate of the grantor. Who was the grantor? Jonathan Jenckes, by his agent Cynthia Jenckes. A confirmation of a deed, is a confirmation of the title professed to be conveyed by that deed. Had Cynthia Jenckes conveyed *her* title, a confirmation would have established her title. As she conveyed the title of Jonathan Jenckes, it

established his title in the grantee. The deed of the executrix was void for want of *authority*, not for want of *estate;* and a subsequent confirmation of a void authority is equivalent to a previous grant.

It is therefore denied that a confirmation by the devisee, of such a deed, would have been inoperative. But suppose it would; does the consequence drawn from that position necessarily follow, that a confirmation by the legislature must share the same fate? Is an act of the legislature to be construed by technical rules of conveyances, or by its main scope and design? What was the sole object of applying to the legislature? The answer must be, to authorize the executrix to convey the title of Jonathan Jenckes to the grantee. The language of the petition and the act are very pointed to this effect.

The whole doctrine of confirmation, however, is applicable only to deeds which contain no other than *technical words* of confirmation. Whenever an intention is manifested to *enlarge* the estate of the grantee, such intention shall prevail. *Co. Litt.* 296, *a.*

Without any further refining upon obsolete rules however, it is enough for our purpose, that even in England none of these rules ever applied to a confirmation by act of parliament.

One other view may be taken of the case, which will relieve it of all objections arising from its retrospective and confirmatory character.

This view is to consider the *deed*, the *bond*, and the *act of the legislature*, as *one conveyance*, having a *present* operation. The parties knew that the deed was void; they knew that no title passed to the grantee. How then could they intend that it should operate until *after* the act was obtained? It would be idle to contend that the parties meant a deed to operate, which they themselves declare to be inoperative and void. The deed was executed and delivered in November 1791, but the deed was only a *part* of the *conveyance*. The act of the legislature was contemplated as another essential part; and when the act was obtained,

it was in *its legal effect* a license to sell the estate, and the deed was given *subsequent* to, and *under* the license. The authorities fully sustain this position.

"In the execution of a power, in order that the deficiency of an instrument may be supplied by the sufficiency of another, it must appear that the parties *intended* they should operate conjointly." 3 *East's Rep.* 410. 438; Earl of Leicester's case, 1 *Ventris*, 278; Herring *vs.* Brown, *Carthew*, 22; 3 *Mass. Rep.* 138; 1 *John. Ch. Rep.* 240.

If, however, there had been originally an incurable defect in this conveyance, an acquiescence of *thirty six years* estops the parties from now making their claim.

"Yet even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of authority is accepted instead of proof." 15 *Mass. Rep.* 26.

Mr Webster, for the defendant in error.

The history of the case is, that there lived a man of the name of Jenckes, who had acquired real estate in Rhode Island; he made his will in 1774, in which he devised his estate to his daughter Lydia for life, and the reversion to his son Jonathan Jenckes. Lydia survived Jonathan Jenckes, who, eight years after the death of his father, made his will, and gave the reversion of the estate to his daughter Cynthia Jenckes. At this time Jonathan Jenckes lived at Winchester in New Hampshire, where he died in 1787. He appointed his wife, whose name was Cynthia, the executrix of his will, with another person who never acted.

The will provided for the payment of debts; and if there was a deficiency in the personal estate, that specific portions of the real estate should be sold for the purpose. Unhappily the executrix entrusted a person who was employed by her, and who took upon himself to do every thing. He acted as agent, commissioner, and purchaser. He also got an agreement for her dower, and sent her to Vermont, where she died. It also happened that a large estate, at that time, turned out to leave but £15 7*s.* 6*d.*

The minors came of age; by good conduct they raised themselves from penury, and have brought their case before this Court.

There is no dispute down to the will of the elder Jonathan Jenckes, or of his son. The plaintiffs below claim under the will. The will was proved and admitted, and the question is, whether the plaintiffs in error are entitled to hold the property. First, it was pleaded, that the plaintiffs below were barred by the statute of limitations, but this has been overruled. They had a title by devise and inheritance, and the question is, whether any one has derived a title from their ancestor which can take it away.

The question turns only on the validity of the title of the plaintiffs in error; who say they are purchasers under Moses Brown and Oziel Wilkinson. That the land in controversy went out of the family; Jonathan Jenckes, the ancestor, having died leaving debts, and the executrix having made sale of the lands for their payment.

The will of Jonathan Jenckes was proved in New Hampshire in 1787: the debts there were all paid.

The defendants in the circuit court produce a deed from Cynthia Jenckes to Moses Brown and Oziel Wilkinson, of November 12, 1791, and a confirmation by the assembly of Rhode Island. What is the character, and what are the powers of the legislature of Rhode Island, will be examined in the course of the argument. The deed purports to proceed by the authority of a license, granted by the judge of probate of New Hampshire. It is not material now to show that all the proceedings in New Hampshire were void; they were all contrary to the law of the state. If the land laid there, the deed would be declared void.

One view is to be taken of this question, which is not to be lost sight of. The laws of the New England states make lands subject to debts. What is the nature of this liability? Where is the title of the land, until it shall be known that it will be wanted for the payment of debts? It is in the heir or the devisee, and the personal representative has nothing but a power to sell it for the payment of debts.

He has a power to sell only on the arrival of certain events; and he who is to exercise that power, must show that those events have arisen.

This power does not exist until the event happens to make it necessary to sell the land.

Every principle of law requires that when this power is exercised, it shall be proved that the case exists to require its employment.

The cases decided in the courts of Massachusetts upon the statute of that state, which is like the statute of New Hampshire, show, that the party claiming under a deed for lands sold for the payment of debts, must show that the event on which the power to sell depended had occurred.

By the laws of New Hampshire the heirs are always to have notice when the estate is to be sold. They also require an inventory of the estate and an order to sell; in this case there was nothing of that kind; there was only a license to sell without any other proceedings. No account was filed in New Hampshire which took any notice of the debts or property in Rhode Island. Cases cited, 11 *Mass.* 511. 12 *Mass.* 503. 6 *Mass.* 149. 3 *Mass.* 259. 1 *Mass.* 40, 46.

It will be seen, from the record, that the will was proved in March, and the license to sell was granted in July, without an inventory and account being made out. The cases cited show, that the judge of probate has no jurisdiction unless it appear that there was occasion to sell. It is contended that if the proceedings in New Hampshire could give no authority there, they could give none in the state of Rhode Island.

There were no proceedings in Rhode Island except the fiat of the legislature. It is not pretended that there were any proceedings in Rhode Island required by the laws of New Hampshire.

Then the first proposition is, that the deed from Cynthia Jenckes to Brown and Wilkinson was a nullity. It created no right in law or equity. It was as the act of a stranger, to grant land which did not belong to him.

This follows, because, 1st, the deed would have been void in New Hampshire.

2d. Because proceedings to divest rights to land, must be according to the law of the land.

It is contended that the powers of the legislature of Rhode Island are unlimited and unrestrained, that they transcend all the powers of the other branches of the government. It is not sufficient to show that the power to divest this property would be limited in England, for the powers of the legislature of Rhode Island are beyond those of the English parliament. It would be well to consider how Rhode Island can be a member of this union, with such a form of government as is asserted to exist there. By the constitution of the United States, every state must be a republic, every state must have a judiciary, legislature and executive, or it is has no constitution.

It is said that Rhode Island has no constitution; that she has grown up without a constitution. If her government has no form; it cannot be a republic, and has no right to come into the unio But it will be found that Rhode Island has a constitution. The charter of Charles II. contains all the provisions for the organization of a government with legislative, judicial and executive branches. It declares that courts of justice shall be established, and thus to them is given the exercise of judicial functions. The legislature is established by the same charter, and its functions cannot be judicial. The powers of a court and of a legislature cannot be blended; nor are they properly under the charter referred to.

If the legislature of Rhode Island has judicial powers, why does not a writ of error lie from this Court to its judgments? Writs of error go from this Court to the highest judicature of the states; but it is not denied that Rhode Island has courts of judicature separate from the legislature, taking cognizance of all cases for judicial decision. The legislature therefore in assuming the powers of a court, which was done when they authorized the sale of the land for the payment of the debts, did what, even under the Rhode Island constitution, they could not do.

A long list of instances of legislative interference has been exhibited by the counsel for the appellees. Some of these cases prove too much. Authority is given in one of them to sell lands in New Hampshire.

It is necessary for the plaintiffs in error to show that the power has been exercised against the bill, in invitum. Parliament, in England, never proceeds upon any private bill, without notice to all the parties; and there is no case in which parliament exercises its authority to dispose of land, without the consent, in writing, of every one who is interested.

The consent of the heirs of Jonathan Jenckes is not recited in the act of the legislature of Rhode Island. To establish a usage for legislation of this kind, it should be shown, that there have been a series of proceedings against the will of parties interested, and without notice.

There is but one of the cases referred to, in which the legislature of Rhode Island has undertaken to act in reference to private rights, which shows that they have given authority to sell lands out of the state. The power must be exercied *legislatively*, or *judicially*. Is the resolution of 1792 an act, or a decree? Is it a decree of a probate court? If it is, then it should be shown that the parties were before the court, or that notice was given to them.

It is immaterial which it is. The case will always be, that the devisees of Jonathan Jenckes had this land until the deed; and that deed is, by the counsel of the plaintiffs, admitted to be void. It remained, therefore, with the heirs, until the resolution or act of the legislature.

Even taking the land to be public domain, the deed would not pass it. It is not operative. It contains no terms of grant, or language of transfer.

The resolution only establishes the deed in its form. There are no words giving, granting, vesting, or divesting of the estate; all that is done is to ratify and confirm the deed. If the confirmation contained words of grant, it would enure as a grant; but this is not the fact.

If the preceding act, that of making the deed for the land to Brown & Wilkinson, was void, there are no words in the law to give it validity.

[Wilkinson *vs.* Leland and others.]

From Bracton down, it has been law, that a confirmation cannot help a void deed. 2 *Thomas's Coke*, 516. *Gilbert on Tenures*, 75. 78.

If there is no precedent estate, the confirmation is void. 4 *Danv. Abrid.* 410. There is no case where confirming words go further than to apply to the thing itself.

The deed was a nullity; to confirm it in its then state, was to keep it such. At that moment it was void; to confirm it was to render it void permanently.

It is as if A. a creditor of B. should go to the legislature and ask that B.'s property be transferred to him, without a trial. It is a condemnation without a hearing, a confiscation of property in time of peace. There is no case in which such legislative proceedings have stood the test of this Court. It is a case where land was vested in those who claim it, and has been taken from them. There was no application to the legislature of Rhode Island by the creditors; no evidence that the interference of the legislature was claimed by them. What then are the facts of the case? The lands descended to the heirs of Jonathan Jenckes. The heirs were in New Hampshire. No creditors applied for the aid of the legislature. There was no notice to the heirs. The deed of the executrix was entirely void; and there is no pretence for saying, that the interests of the heirs were in any manner regarded in the course of the proceedings. Under these facts the law was passed; and whatever words were used, it could not have any effect, for want of power in the body which enacted it.

This is a private act; and upon every principle and rule of legislative proceedings, all the parties to be affected by it, should have had notice, and should have consented to it. This is the course of legislation in the British parliament. 3 *Black. Com.* 345.

It is of no importance to the question before the Court, whether there are restrictions or limitations, to the power of the legislature of Rhode Island, imposed by the constitution. If at this period there is not a general restraint on legislatures, in favour of private rights, there is an end to private property.

[Wilkinson *vs.* Leland and others.]

Though there may be no prohibition in the constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact; such as giving the property of A. to B. Cited 2 *Johns.* 248; 3 *Dall.* 386; 12 *Wheaton*, 303; 7 *Johns.* 93; 8 *Johns.* 511.

In this case it may be considered that the legislature gave the act, but they did not guaranty its validity. They gave it because it was asked for, but subject to all exceptions. They put it in the power of the persons who were interested in its operation, to make it valid by obtaining the assent of the devisees, and of doing all other acts which were necessary to give it validity.

It is said, that were the state of Rhode Island under the restrictions of a written constitution, like other states, the power to pass such a law might not exist; but there the legislature acts by the sovereign authority of the people, who may build up and destroy. This is denied. Rhode Island must be a republican state, and the government must be divided into departments, and must be a government of laws. These departments may exist, although the same body exercises the functions of both. This is done in New York. But where a legislature acts judicially, it proceeds according to the forms, and upon the principles which regulate courts. In this case, the legislature acted legislatively. The language is, Resolved: judicial tribunals decree, adjudge.

As to the precedents which have been referred to, from the proceedings of the legislature of Rhode Island, it may be well observed, that the same irregularities will be found in the early proceedings of the governments of all the states, before the principles of government were understood or applied. The answer to them is, that the rights of property were not then well understood.

Or if we consider the words operating not on the instrument, but on the title; if they had been, "confirm and ratify the title set forth in the deed;" still it passes no title. There was nothing in the grantees to confirm. Confirmation, to enable it to operate, requires privity.

Where was the fee in the property from November 1791 until 1792? It was with the heirs, and from them it could not be taken but by a course of judicial proceeding. The legislature, by no form of words, could have divested the land out of the heirs, and vested it in the purchasers.

The general ground assumed by the defendants in error is, that the act of the legislature is inoperative, because it does not divest their rights; for the legislature of Rhode Island had no right to pass such a law. The law itself is intended as a remedy, and was no more. Its purport is to establish a sale made for the payment of debts, and its terms import no more.

It is said, that no interest in the land existed in the devisees of Jonathan Jenckes, because they took the estate *loaded* with the debts of the devisor. This inference is incorrect; that their estate might be made subject to these debts, did not prevent its vesting in the claimants, and those under whom they make title. It is agreed that this estate might be divested; but only by judicial proceedings. The argument is, that the property could not be taken away, without proceedings of a judicial character.

It is said, the statute gave a remedy because the creditors had a right to be paid out of the estate, and that this was an interference for their benefit. If it had been a proceeding to bring rights into adjudication, it would be so; but in this case the rights of the devisees were adverse to those of the executors, and to the claims of the creditors.

Mr Wirt, in reply.

It is a matter of surprise how the strongest minds will err when they look through the mist of prejudice. Nothing more has been done in this case than is done by the courts of probate in Vermont and Massachusetts. What is the monster that the gentleman has created? It is that the legislature has authorized an executrix to sell lands for the payment of debts. "This is the very head and front of their offending." It was a mere act of common justice, due and performed in the course of justice in all the states of the union. The facts of the case may be briefly stated from the

bill of exceptions. Jonathan Jenckes died in 1787, seised of the lands, subject to a life estate to Lydia his sister. That estate was devised to his daughter, subject to the life estate. Cynthia Jenckes, his wife, was executrix, and qualified. At the time of his death there were debts which absorbed all his personal estate, and ultimately all his real estate but a small portion. The judge of probate, after examination, gave a license to sell the real estate. It was sold by the executrix to those under whom the plaintiff in error claims, the sale to be confirmed by an act of the legislature of Rhode Island where the lands laid. The legislature passed a confirming act, and the purchase money was paid, and the debts of Jonathan Jenckes were discharged.

The purchase was made on the faith of the law of Rhode Island; the money paid upon the faith of that law; and all this was done, thirty-four years before the ejectment was brought in the circuit court of Rhode Island. In the mean time other bona fide purchasers have become possessed of the land: and who come forward now to claim it?—not other bona fide purchasers, but the heirs of Jonathan Jenckes.

The attempt here is, to make the lands fulfil two purposes, 1. The payment of the debts of their father by the sale; and 2. Then to recal that sale, that the lands may support the heirs of the debtor. The claim is against all the policy, and the course of proceeding in New England.

The case comes here under a pro forma judgment of the circuit court. The inquiry is, whether the court erred in giving the instructions asked for; in saying that the conveyance and proceedings, by which the title was intended to be vested in the purchasers, did not divest the legal estate of the heirs of Jonathan Jenckes.

In Massachusetts and Rhode Island all the estate real and personal of the deceased is subject to the payment of debts. All the statutes of the northern states, although they vary in detail, contain this principle. *Bigelow's Digest*, 350. 4 *Mass.* 354. 18 *Mass.* 157. 4 *Mass.* 654. 3 *Mass.* 258. 1 *Mass.* 340.

By a reference to these authorities, it will appear that in order to justify a license to sell in either of those states,

nothing more is necessary but to satisfy the judge that the personal estate is not sufficient to discharge the debts of the deceased. No form of proceeding is required. It is done by presenting the account of the debts and personal estate, and the judge then gives the license.

Objections have been made by the counsel for the defendants in error, to the proceedings in New Hampshire. It is said they were a nullity; that they were irregularly granted. This is denied, and no authorities have been shown in support of the objections. It has been urged that notice should have been given to the heirs. There has been no case cited in Massachusetts which looks to the necessity of notice to the heirs of the application for a license to the judge of probate.

The regularity of the proceedings is to be presumed, after so long a lapse of time. If notice is required; if evidence different from that which is shown to have been exhibited before the judge of probate was necessary; it is, and ought to be considered that it was furnished.

In legal contemplation, both the real and personal estate of a deceased person, go into the hands of the executor for the payment of debts. 4 *Mass.* 354. 18 *Mass.* 157. Executors have no right to take possession of the lands, but it is often done with the approbation of courts.

To show how completely lands are in the hands of executors, where a judgment is obtained against executors for the debt of the testator, the plaintiff may issue his execution against the lands, in the hands of the heir. 3 *Mass.* 258.

It is true the title descends to the heir, but it descends subject to the debts. The heir takes the lands, liable to their being taken from him when the debts require it; without proceedings against him, and without notice to him. *Bigelow's Dig.* 355. Nor is it only in the hands of the heir they are thus liable, they continue so when they have passed to his alienee.

Such is the law of vested estates, with which it is said the legislature has interfered. The estate upon which the law operated, was held by the heirs, subject to the exercise of the very power by which it was taken from the heir.

The law of New Hampshire is the same as that of Massachusetts. In New Hampshire, the proper tribunal to authorise the sale of the land was applied to; and thus the acts done by the executrix were those which the testator, who directed a sale of his real estate for the payment of his debts, authorized her to do.

But if these proceedings were irregular, it would not affect the case. It is not meant to contend that the license to sell, given by the judge in New Hampshire, authorized the sale in Connecticut. What was the power of the executrix under the will? As an executrix, she had the power to do all and every thing an executrix could do by law. In some of the states, executors who have been qualified in one state, can act in all. This is the law of Pennsylvania, and of North Carolina, and of Mississippi. Under the will of her husband, Cynthia Jenckes could do any thing in Rhode Island, which she could do in New Hampshire. She entered Rhode Island as the regular agent to pay the debts due by the testator. The probate of the will only was necessary. In this character she made a sale of a portion of the estate, having no authority to do so; this is admitted. In order to induce the purchase, she gave her bond, by which it was stipulated that she would obtain an act of the legislature to make the sale valid, and this was done. Thus the principles of the laws of Rhode Island were applied, and the estate became the means of discharging the debts of the testator.

By a comparison of the acts of the courts of other states, we shall see how far the act of Rhode Island exceeded the powers exercised by them. It is said that this is a case of a trial without notice; a confiscation! In no case where proceedings against executors are resorted to, for the purpose of making lands a fund to pay debts, is notice given to heirs,—not in the courts of other states,—but in the court of probate in Rhode Island, or New Hampshire. The reproaches which have been cast upon the acts of Cynthia Jenckes, apply, therefore, with equal right to all proceedings of this description; nor is there any reason why notice should be given to the heirs; they take the estate as has been stated, subject to the debts of the ancestor.

It has been said that in the proceedings there was fraud, that the legislature were deceived. This is denied: but if it were so, would this Court set aside the law; the remedy in such a case would be by an application to the sovereign who had been deceived.

The legislature passed the law for the purpose of giving validity to an act, which all knew without it would not pass the estate.

The petition of Cynthia Jenckes was not that they should ratify the deed, but the sale; that is, that the sale should be effectual to convey the estate of the testator.

Who is the sovereign that can give validity to measures which are intended to pass the title to lands within the state? Is it not the legislature of the state, and are not its acts effectual to do this, unless they come in contact with the great principles of the social compact? What power has this Court to say this deed shall not pass the estate? With which of the principles of the constitution of the United States is it in conflict? Where is the provision which it opposes? It is not an ex post facto law. The prohibition in the constitution in reference to ex post facto laws applies to criminal enactments. Is it a law which impairs the obligation of a contract? It affirms a contract. It is said to be incompatible with a republican government.

It denied that legislative, executive and judicial powers must be in different hands to constitute a republican form of government. That this should be so is a great and important principle, but it is not a test of republican government. There is nothing which prohibits the exercise of all the powers of government by a legislature. If the guarantee of a republican form of government by the United States was violated by the government of Rhode Island, why had not the United States interfered?

The charter of the government of Rhode Island is a skeleton; it does not form the government. It is the usages of Rhode Island that compose the constitution. The people say their legislature shall have certain powers, and be unlimited; this is therefore the form of government with which they are satisfied. Politicians may protest, and orators may

declaim; but this does not affect the case. This Court will not take away from them what they have said they will have.

The references, which have been made to the proceedings of the legislature, show that it exercises all kinds of power. It is said this is a new case; suppose it is so, is it necessary to show the authority for the first law? The authority is that of the people. The legislature always has acted as the emergency presented. Whom do they injure? They do not infringe their own constitution; and when they do so, it is for the people of the state to interfere. They do nothing which is contrary to the constitution of the United States.

If the legislature of Rhode Island possessed the power to order a sale, why not have power to confirm the sale? There is no exercise of a greater power here. A court of probate might not do it, but that court is limited in its powers. A subsequent ratification is equivalent to a prior authority.

It is said that the state has done what parliament could not have done. Blackstone has been referred to, to show that private acts do not pass without notice. Parliament cuts the knot and destroys contracts, and therefore notice is necessary.

There is no violation of contract in this act; the law only supposes an omitted case, and gives a remedy where the principles of law require it.

It is contended that the confirmation has no effect, because it operates on a void deed. A reference to authorities will show the error of this assumption. 1 *Roll. Ab.* 483. *Ld. Raym.* 292. 297.

Cannot parliament confirm a void deed? They can do so, and the right has never been questioned.

Mr Justice Story delivered the opinion of the Court.

This is a writ of error to the circuit court of the district of Rhode Island, in a case where the plaintiff in error was defendant in the court below. The original action was an ejectment, in the nature of a real action, according to the local practice, to recover a parcel of land in North Providence in that state. There were several pleas pleaded of the statute of limitations, upon which it is unnecessary to

say any thing, as the questions thereon have been waived at the bar. The cause was tried upon the general issue; and, by consent of the parties, a verdict was taken for the plaintiffs, and a bill of exceptions allowed upon a pro forma opinion given by the court in favour of the plaintiffs, to enable the parties to bring the case before this Court for a final determination. The only questions which have been discussed at the bar arise under this bill of exceptions.

The facts are somewhat complicated in their details, but those which are material to the points before us may be summed up in a few words.

The plaintiffs below are the heirs at law of Cynthia Jenckes, to whom her father, Jonathan Jenckes, by his will in 1787, devised the demanded premises in fee, subject to a life estate then in being, but which expired in 1794. By his will, Jonathan Jenckes appointed his wife Cynthia, and one Arthur Fenner, executrix and executor of his will. Fenner never accepted the appointment. At the time of his death Jonathan Jenckes lived in New Hampshire, and after his death his widow duly proved the will in the proper court of probate in that state, and took upon herself the administration of the estate as executrix. The estate was represented insolvent, and commissioners were appointed in the usual manner to ascertain the amount of the debts. The executrix, in July 1790, obtained a license from the judge of probate in New Hampshire, to sell so much of the real estate of the testator, as, together with his personal estate, would be sufficient to pay his debts and incidental charges. The will was never proved, or administration taken out in any probate court of Rhode Island. But the executrix, in November 1791, sold the demanded premises to one Moses Brown and Oziel Wilkinson, under whom the defendant here claims, by a deed, in which she recites her authority to sell as aforesaid, and purports to act as executrix in the sale. The purchasers, however, not being satisfied with her authority to make the sale, she entered into a covenant with them on the same day, by which she bound herself to procure an act of the legislature of Rhode Island, ratifying and confirming the title so granted; and, on failure thereof,

to repay the purchase money, &c. &c. She accordingly made an application to the legislature of Rhode Island for this purpose, stating the facts in her petition, and thereupon an act was passed by the legislature, at June session 1792, granting the prayer of her petition and ratifying the title. The terms of this act we shall have occasion hereafter to consider. In February, 1792, she settled her administration account in the probate court in New Hampshire, and thereupon the balance of £15 7*s.* 7*d.* only remained in her hands for distribution.

Such are the material facts; and the questions discussed at the bar, ultimately resolve themselves into the consideration of the validity and effect of the act of 1792. If that act was constitutional, and its terms, when properly construed, amount to a legal confirmation of the sale and the proceedings thereon, then the plaintiff is entitled to judgment, and the judgment below was erroneous. If otherwise, then the judgment ought to be affirmed.

It is wholly unnecessary to go into an examination of the regularity of the proceedings of the probate court in New Hampshire, and of the order or license there granted to the executrix to sell the real estate of the testator. That cause could have no legal operation in Rhode Island. The legislative and judicial authority of New Hampshire were bounded by the territory of that state, and could not be rightfully exercised to pass estates lying in another state. The sale, therefore, made by the executrix to Moses Brown and Oziel Wilkinson, in virtue of the said license, was utterly void; and the deed given thereupon was, proprio vigore, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity.

Upon the death of the testator, his lands in Rhode Island, if not devised, were cast by descent upon his heirs, according to the laws of that state. If devised, they would pass to his devisees according to the legal intendment of the words of the devise. But, by the laws of Rhode Island, the probate of a will in the proper probate court is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of

the testator. No probate of this will has ever been made in any court of probate in Rhode Island; but that objection is not now insisted on; and if it were, and the act of 1792 is to have any operation, it must be considered as dispensing with or superseding that ceremony.

The objections taken by the defendants to this act, are, in the first place, that it is void as an act of legislation, because it transcends the authority which the legislature of Rhode Island can rightfully exercise under its present form of government. And, in the next place, that it is void as an act of confirmation, because its terms are not such as to give validity to the sale and deed, so as to pass the title of the testator, even if it were otherwise constitutional.

The first objection deserves grave consideration from its general importance. To all that has been said at the bar upon the danger, inconvenience and mischiefs of retrospective legislation in general, and of acts of the character of the present in particular, this Court has listened with attention, and felt the full force of the reasoning. It is an exercise of power, which is of so summary a nature, so fraught with inconvenience, so liable to disturb the security of titles, and to spring by surprise upon the innocent and unwary, to their injury and sometimes to their ruin; that a legislature invested with the power, can scarcely be too cautious or too abstemious in the exertion of it.

We must decide this objection, however, not upon principles of public policy, but of power; and precisely as the state court of Rhode Island itself ought to decide it.

Rhode Island is the only state in the union which has not a written constitution of government, containing its fundamental laws and institutions. Until the revolution in 1776, it was governed by the charter granted by Charles II. in the fifteenth year of his reign. That charter has ever since continued in its general provisions to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people; and, except so far as it has been modified to meet the exigences of the revolution, may be considered as now a fundamental law. By this charter the power to make laws is granted to the gene-

ral assembly in the most ample manner, "so as such laws, &c. be not contrary and repugnant unto, but as near as may be agreeable to the laws, &c. of England, considering the nature and constitution of the place and people there." What is the true extent of the power thus granted, must be open to explanation, as well by usage, as by construction of the terms, in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island, as an exercise of transcendental sovereignty before the revolution, it can scarcely be imagined that that great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention. In Terret *vs.* Taylor, 9 *Cranch*, 43, it was held by this Court, that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property *lawfully*

acquired. We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine.

The question then arises whether the act of 1792 involves any such exercise of power. It is admitted that the title of an heir by descent in the real estate of his ancestor, and of a devisee in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title encumbered with all the liens which have been created by the party in his life time, or by the law at his decease. It is not an unqualified, though it be a vested interest; and it confers no title, except to what remains after every such lien is discharged. In the present case, the devisee under the will of Jonathan Jenckes without doubt took a vested estate in fee in the lands in Rhode Island. But it was an estate, still subject to all the qualifications and liens which the laws of that state annexed to those lands. It is not sufficient to entitle the heirs of the devisee now to recover, to establish the fact that the estate so vested has been divested; but that it has been divested in a manner inconsistent with the principles of law.

By the laws of Rhode Island, as indeed by the laws of the other New England states, (for the same general system pervades them on this subject) the real estate of testators and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate. The deficiency being once ascertained in the probate court, a license is granted by the proper judicial tribunal, upon the

petition of the executor or administrator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island, the license to sell is granted, as matter of course, *without notice* to the heirs or devisees; upon the mere production of proof from the probate court of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may enter and recover the possession of the estate, notwithstanding any intermediate descents, sales, disseisins, or other transfers of title or seisin. If therefore the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operations of law, divested and superseded; and so, pro tanto, in case of a partial sale.

From this summary statement of the laws of Rhode Island, it is apparent, that the devisee under whom the present plaintiffs claim, took the land in controversy, subject to the lien for the debts of the testator. Her estate was a defeasible estate, liable to be divested upon a sale by the executrix, in the ordinary course of law, for the payment of such debts; and all that she could rightfully claim, would be the residue of the real estate after such debts were fully satisfied. In point of fact, as it appears from the evidence in the case, more debts were due in Rhode Island than the whole value for which all the estate there was sold; and there is nothing to impeach the fairness of the sale. The probate proceedings further show, that the estate was represented to be insolvent; and in fact, it approached very near to an actual insolvency. So that upon this posture of the case, if the executrix had proceeded to obtain a license to sell, and had sold the estate according to the general laws of Rhode Island, the devisee and her heirs would have been divested of their whole interest in the estate, in a manner entirely complete and unexceptionable. They have been divested of their formal title in another manner, in favour of creditors entitled to the estate; or rather, their formal title has been made subservient to the paramount title of the creditors.

Some suggestions have been thrown out at the bar, intimating a doubt whether the statutes of Rhode Island, giving to its courts authority to sell lands, for payment of debts, extended to cases where the deceased was not, at the time of his death, an inhabitant of the state. It is believed that the practical construction of these statutes has been otherwise. But it is unnecessary to consider whether that practical construction be correct or not, inasmuch as the laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts, whether inhabitants or not. If the authority to enforce such a charge by a sale be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself. If it be so confided, it still remains to be shown, that the legislature is precluded from a concurrent exercise of power.

What then are the objections to the act of 1792? First, it is said that it divests vested rights of property. But it has been already shown that it divests no such rights, except in favour of existing liens, of paramount obligation; and that the estate was vested in the devisee, expressly subject to such rights. Then again, it is said to be an act of judicial authority, which the legislature was not competent to exercise at all; or if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the act is to be considered as a judicial act; but as an exercise of legislation. It purports to be a legislative resolution, and not a decree. As to notice, if it were necessary, (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to, which touch private rights,) it might well be presumed, after the lapse of more than thirty years, and the acquiescence of the parties for the same period, that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be, or is in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange, if the legislature might not do without notice the same act which it would delegate authority to another to do without notice. If the legislature had authorised a future sale by the execu-

trix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate, instead of the legislature itself. It is remedial in its nature, to give effect to existing rights.

But it is said that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith, (for it is not attempted to be impeached for fraud;) and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was bona fide, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale then was ratified by the legislature; not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power; unless we are prepared to say, that in a state not having a written constitution, acts of legislation, having a retrospective operation, are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed as a general principle, by courts of justice. The present case is not so strong in its circumstances as that of Calder *vs.* Bull, 3 *Dall. Rep.* 386, or Rice *vs.* Parkman, 16 *Mass. Rep.* 226; in both of which the resolves of the legislature were held to be constitutional.

Hitherto, the reasoning of the Court has proceeded upon the ground that the act of 1792 was in its terms sufficient to give complete validity to the sale and deed of the executrix, so as to pass the testator's title. It remains to consider, whether such is its predicament in point of law.

For the purpose of giving a construction to the words of the act, we have been referred to the doctrine of confirma-

tion at the common law, in deeds between private persons. It is said that the act uses the appropriate words of a deed of confirmation, "ratify and confirm;" and that a confirmation at the common law will not make valid a void estate or act, but only one which is voidable. It is in our judgment wholly unnecessary to enter upon any examination of this doctrine of the common law, some of which is of great nicety and strictness; because the present is not an act between private persons having interests and rights to be operated upon by the terms of their deed. This is a legislative act, and is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. It cannot be doubted that an act of parliament may by terms of confirmation make valid a void thing, if such is its intent. The cases cited in *Plowden*, 399, in *Comyn's Dig.* Confirmation, D.; and in 1 *Roll. Abridg.* 583, are directly in point. The only question then is, what is the intent of the legislature in the act of 1792? Is it merely to confirm a void act, so as to leave it void, that is to confirm it in its infirmity? or is it to give general validity and efficacy to the thing done? We think there is no reasonable doubt of its real object and intent. It was to confirm the *sale* made by the executrix, so as to pass the title of her testator to the purchasers. The prayer of the petition, as recited in the act, was, that the legislature would "*ratify* and *confirm the sale* aforesaid, which was made by a deed executed by the executrix, &c." The object was a ratification of the *sale*, and not a mere ratification of the formal execution of the deed. The language of the act is "on due consideration whereof it is enacted, &c. that *the prayer of the said petitioner be granted*, and that the deed be, and the same is hereby ratified and confirmed, so far as respects the *conveyance of any right or interest* in the estate mentioned in said deed, which belonged to the said Jonathan Jenckes at the time of his decease." It purports therefore to grant the prayer, which asks a confirmation of the sale, and confirms the deed, as a *conveyance of the right and interest* of

the testator. It is not an act of confirmation by the owner of the estate; but an act of confirmation of the sale and conveyance, by the legislature in its sovereign capacity.

We are therefore all of opinion that the judgment of the circuit court ought to be reversed, and that the cause be remanded with directions to the court to award a venire facias de novo.